

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
BRISTOL SPORTING GOODS, INC.,)	CASE NO. 04-30495 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
JACQUELINE SELLS HOMANN, TRUSTEE,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 05-3016
)	
M.B.C. DISTRIBUTING, INC.,)	
)	
DEFENDANT.)	

Appearances:

Jacqueline Sells Homann, Esq., Trustee, Jones Obenchain, LLP, Post Office Box 4577, South Bend, Indiana 46634-4577; and

Mark D. Altenhof, Esq., attorney for defendant, 301 South Main Street, Suite 100, Elkhart, Indiana 46517.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 24, 2006.

Before the court are the Complaint to Determine, Avoid and Recover a Preferential Transfer or Fraudulent Conveyance, filed by Jacqueline Sells Homann, Trustee, and the Answer of the defendant M.B.C. Distributing, Inc. Twice the court directed the parties to file a stipulation of facts and briefs in the matter. Twice they failed to follow the court's orders. The court therefore took the Complaint and Answer under advisement on April 6, 2006. For the reasons that follow, the court dismisses the Trustee's Complaint.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and

determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(H) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The debtor, Bristol Sporting Goods, Inc., filed a voluntary chapter 7 petition on February 10, 2004. Jacqueline Sells Homann, the chapter 7 Trustee, then filed a Complaint against the defendant M.B.C. Distributing, Inc., a sporting goods distributor, to recover certain inventory of the debtor on behalf of his bankruptcy estate. The Complaint alleged that the defendant, which did business with the debtor before bankruptcy, took possession of inventory valued at approximately \$10,000 on May 1, 2003. According to the Complaint, the defendant had no judgment lien or security interest in the inventory and therefore no right to it; nor did the debtor receive anything of value for the inventory. The Complaint asserted that the defendant's act, in taking possession of the debtor's inventory, constituted a fraudulent transfer in violation of 11 U.S.C. § 548(a)(1)(B). It requested an accounting of the property and a judgment to recover the amount of the fraudulent transfer.

The defendant, in its Answer, admitted that it retrieved items from the debtor that were valued at approximately \$10,000, but it disputed the date of May 1, 2003. It explained that the two businesses had a lengthy business relationship and that belated payment for items was permitted in the normal course of business between them. In the case of the items in question, the defendant stated that the debtor had arranged for the items to be returned to the defendant and had not paid for them. According to the defendant, the debtor had not acquired any rights to the items. The itemized inventory was attached to the Answer as Exhibit A. The cover

page of the inventory list was dated June 13, 2003. It presented the following message from Chad, at M.B.C. Distributing, Inc., to Steve, at Bristol Sporting Goods:

Steve – Please find attached itemized copies of the inventory returned to offset invoice # 031903. The total value of inventory returned totals \$13,777.04. After deducting \$13,127.66 for the outstanding balance and \$462.91 for the labor charges, there is a credit balance of \$186.47. I have waived the 15% restocking charge we would normally add as long as the balance outstanding is resolved by 6-27-03. I will stop to see you on Wed. to finish any paperwork. Chad.

R. 7, Ex. A at 1. Below the cover sheet were 13 pages of ordered and returned items, including lures, hooks, spinner baits, poppers, owl hooters, map books, rods, reels, knives, spears, cricket cages, and many other assorted fishing and hunting items.

At the telephonic pre-trial conference, the parties were directed to file a stipulation of facts and briefs. When they failed to do so, the court set a status conference. At that conference, the parties advised the court that settlement was likely. Nevertheless, they failed to settle. The court again ordered the parties to file stipulated facts and established a briefing schedule. Nothing was filed. The court therefore took the matter under advisement on April 6, 2006.

Discussion

The Trustee claimed that the defendant took possession of inventory to which it had no right and paid the debtor nothing of value in return. She alleged that the defendant's actions constituted a fraudulent transfer in violation of 11 U.S.C. § 548(a)(1)(B). The statute provides:

§ 548(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntary or involuntarily –

...

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a)(1)(B).

“In order for the trustee to obtain relief under section 548(a)(1)(A) or (B), there must have been a ‘transfer of an interest of the debtor in property.’” *Dunham v. Cacique*, 192 F.3d 1104, 1109 (7th Cir. 1999) (quoting § 548(a)(1)); *see also Foreland v. Agnates Corp. (In re Consolidated Industries Corp.)*, 292 BR. 354, 358-59 (N.D. Ind. 2002). The Trustee alleged that certain inventory of the debtor, valued at \$10,000, had been transferred to the defendant and that the defendant “had no right in and to the inventory.” R. 1, ¶ 6. She also alleged: “Upon information and belief, the debtor received anything [*sic*] of value in connection with M.B.C. Distributing, Inc. taking possession of the inventory.” *Id.* at ¶ 7. The defendant denied that allegation:

[T]he debtor and the defendant have had a lengthy business relationship and belated payment for items was in the normal course of business between the parties. Moreover, the debtor never paid for the items and had not yet acquired rights to the property. The debtor personally contacted the Defendant and personally requested the Defendant retrieve the items delivered.

R. 7, ¶ 6. The court finds that the plaintiff sufficiently alleged the first essential element of § 548(a)(1) and that the defendant raised a genuine issue of fact concerning this element. There is also a question about the date of the transfer, but both alleged dates occurred within one year before the date of the filing of the debtor's petition in bankruptcy. *See Olsen v. Flit*, 219 F.3d 655, 656 (7th Cir.) (noting that § 548(a)(1) reaches back just one year).

The Trustee thus has identified the debtor's property and the transfer being challenged. However, she has failed to allege with sufficient particularity the constructive fraud underlying the transfer. *See Kleven v. Norkus (In re Chochos)*, 325 BR. 780, 783 (Bank. N.D. Ind. 2005) (dismissing one count of a § 548(a)(1)(B) complaint on the ground that the statutory elements were not stated with sufficient particularity); *see also Dunham*, 192 F.3d at 1109 (stating “that section 548(a)(1) requires proof of circumstances in addition to the debtor's transfer of a property interest before the transfer can be deemed fraudulent and set aside”).

For a constructively fraudulent conveyance – one made for less than reasonably equivalent value – the complaint will be sufficient if, in addition to such things as the required jurisdictional allegations, it identifies the debt or other basis for plaintiff’s right to bring the action, describes the transfers that are being challenged, and alleges insolvency either as a result of or at the time of the challenged transfers.

In re Chochos, 325 BR. at 783. In this case, the Trustee did not allege that the debtor transferred the property for less than reasonably equivalent value. At a status conference, the court questioned the Trustee on this matter and was told that the Complaint should have stated, in paragraph 7, that, “[upon information and belief, the debtor received *nothing* of value in connection with [the defendant’s] taking possession of the inventory.” That clarification is consistent with the defendant’s Answer, which states that the debtor, in the normal course of business between the parties, never paid for the items and asked the defendant to retrieve them after they had been delivered to the debtor. The court accepts, therefore, the revised allegation that the debtor received nothing for the property in question. It finds that the allegation under § 548(a)(1)(B)(i) is proper.

Nevertheless, the Complaint still is insufficient. It failed to allege that the debtor either was insolvent at the time of the transfer or became insolvent as a result of the transfer. *See Global Link Liquidating Trust v. Avantel, S.A. (In re Global Link Telecom Corp.)*, 327 BR. 711, 718 (Bank. D. Del. 2005) (finding that “‘all that need be alleged is that the conveyance was made without fair consideration’ while the debtor was functionally insolvent”) (quoting *Hassett v. Weissman (In re O.P.M. Leasing Servs., Inc.)*, 35 BR. 854, 862-63 (Bank. S.D.N.Y. 1983)). The Seventh Circuit Court of Appeals emphasized the importance of this element of § 548(a)(1)(B). “The debtor’s insolvency at the time of, or as a result of, the transfer is highly material, because it is the state of impecuniousness that casts the shadow of constructive fraud upon the transaction.” *Dunham*, 192 F.3d at 1109-10. Subsections (i) and (ii) are in the conjunctive, not disjunctive; both elements must be alleged and established.

In this case, the Trustee did not claim that the debtor was insolvent or was made insolvent by that transfer, and in fact gave no information concerning the debtor’s financial status at that time. Nor was there any evidence in the record to suggest the insolvency of the debtor at the time of the transfer. The court twice gave

the parties the opportunity to provide stipulated facts and to brief the issues. The Trustee, by declining to present any evidence to establish the essential elements of § 548(a)(1)(B), has forfeited any right to do so now. *Cf. Dunham*, 192 F.3d at 1110 (finding that the trustee had waived her right to argue a point not raised in her briefs). In a § 548(a)(1)(B) complaint alleging a constructively fraudulent transfer, the court does not require the level of pleading of fraud that it would expect in a complaint under § 548(a)(1)(A), which claims actual intent. Nor does it expect a plaintiff to prove her case in a complaint. Nevertheless, it requires the allegation of sufficient facts to support a claim under § 548(a)(1)(B), and it does not find them in this Complaint. The court finds, in particular, that the requirement of § 548(a)(1)(B)(ii) was not satisfied. It determines, therefore that the Complaint should be dismissed for failure to plead with the requisite specificity. *See In re Chochos*, 325 BR. at 783 (dismissing a claim because “the complaint says nothing about the debtor’s lack of solvency at the time of or as a result of the unidentified transfers, and this is a critical element in the recovery of constructively fraudulent conveyances”).

Conclusion

For the reasons presented above, the court dismisses the Complaint to Determine, Avoid and Recover a Preferential Transfer or Fraudulent Conveyance filed by the plaintiff Jacqueline Sells Homann, Trustee, for failure to plead 11 U.S.C. § 548(a)(1)(B) with the requisite specificity.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT